Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

INTERNATIONAL ASSOCIATION OF ENTREPRENEURS OF AMERICA BENEFIT TRUST,

Petitioner,

vs.

JAY ANGOFF, DIRECTOR, MISSOURI DEPARTMENT OF INSURANCE,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the District Court is permitted to abstain from exercising its *exclusive* jurisdiction over an ERISA fiduciary's action under § 502(a)(3) of ERISA in deference to a state court proceeding in which the ERISA fiduciary is a defendant and would be unable to invoke the remedies provided by § 502(a)(3)?

2. When a complaint, on its face, invokes the exclusive subject matter jurisdiction of the United States District Court, must the District Court exercise its jurisdiction to determine whether exclusive subject matter jurisdiction exists, or may the District Court leave determinations which are dispositive of its exclusive subject matter jurisdiction to a state court for determination?

LIST OF PARTIES

The parties involved are International Association of Entrepreneurs of America; International Association of Entrepreneurs of America Benefit Trust; International Association of Entrepreneurs of America, Inc., and Jay Angoff, Director, Missouri Department of Insurance. This petition is brought by the International Association of Entrepreneurs of America Benefit Trust.

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OPINIONS BELOW

The United States District Court for the District of Missouri issued its Order dismissing Petitioners' prayer for declaratory relief on April 13, 1994. The unreported Order is reprinted within Petitioners' Appendix at App. 15. On November 2, 1994, the District Court issued its Order denying Petitioners' motion for reconsideration. That Order is reprinted at App. 11.

Petitioners made a timely appeal to the United States Court of Appeals for the Eighth Circuit. On June 30, 1995, a panel of the Court of Appeals issued its Order affirming the central holding of the District Court, but reversing the ultimate disposition, holding that the District Court should have stayed rather than dismissed the action. The opinion is published at 58 F.3d 1266 (8th Cir. 1995) and appears within the Appendix at App. 1. Petitioners requested rehearing from the Court of Appeals, which was denied on August 4, 1995. The order denying the rehearing appears within the Appendix at App. 10.

JURISDICTION

The decision of the United States Court of Appeals for the Eighth Circuit is sought to be reviewed. The decision was filed on June 30, 1995. Petitioners' request for rehearing was denied by the Court of Appeals on August 4, 1995.

Jurisdiction to review the judgment of the Eighth Circuit in this civil case by writ of certiorari exists under

28 U.S.C. §§ 1254(1) and 2101(c), in compliance with Rule 12 of the Supreme Court of the United States.

STATUTES INVOLVED

Statutory provisions herein involved are § 502(a)(3) and § 502(e)(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1132(a)(3) and (e)(1). The Declaratory Judgment Act, 28 U.S.C. § 2201 is also involved.

STATEMENT OF THE CASE

The International Association of Entrepreneurs of America (the "Association") is a non-profit association which provides a variety of benefits to its employer members. The founding employer members of the Association established an ERISA-regulated employee welfare plan (the "Plan") which offers worker's compensation, accidental death and dismemberment, health/hospitalization, dental and disability benefits. The International Association of Entrepreneurs of America Benefit Trust (the "Benefit Trust") administers the Plan under the day-to-day supervision of its trustee, Ross Fuller.

On March 1, 1993, Jay Angoff, the Missouri Director of Insurance (the "Director") began a proceeding in Missouri state court to obtain a declaration that the International Association of Entrepreneurs of America, Inc. and the IAEA Employee Welfare Benefit Fund had violated

Missouri insurance laws by offering and/or selling insurance without being licensed as an insurance company or complying with the provisions of Mo. Rev. Stat. § 375.786.[1] The Director sought a temporary injunction to prevent both parties from conducting further activities in Missouri. The Director's original petition was dismissed, and an amended petition was filed on April 13, 1993.

On February 17, 1994, the Association, the Benefit Trust, and the International Association of Entrepreneurs of America, Inc. commenced this action in the United States District Court for the District of Missouri seeking a declaration that, pursuant to ERISA, the Benefit Trust and the Plan are exempt from any licensing and insurance requirements imposed by Missouri state law. The Petition for Declaratory Judgment is reprinted at App. 26. The jurisdiction of the District Court was invoked pursuant to ERISA, 29 U.S.C. § 1001 *et seq.*; 28 U.S.C. § 1331; and 28 U.S.C. § 2201. (App. 28.)

The Director filed a motion to dismiss and an amended motion to dismiss the Petitioners' complaint on March 9 and April 11, 1994, respectively. In his amended motion, the Director urged the District Court to dismiss the complaint based on the abstention doctrine enunciated in *Younger v. Harris* 401 U.S. 37 (1971) contending that the complaint was merely a "defense" to the Director's regulatory actions and that the claims in the complaint could be adjudicated as "defenses" in the proceedings before the state court.

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[1] Neither the Benefit Trust nor the Association were named parties in the Missouri state court action.

Petitioners opposed the Director's motion on the ground that abstention was not permissible. Petitioners' claims for equitable relief under § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), are within the District Court's exclusive subject matter jurisdiction pursuant to ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1), and *Younger* abstention is available only when the District Court and a state forum share concurrent jurisdiction.

The District Court, in its April 13, 1994 Order, held that Petitioners' claims could be characterized as "defenses" to the Director's state court proceedings and should properly be adjudicated in the state court proceedings. (App. 22-24.) In reaching this conclusion, the District Court relied upon decisions of this Court under the "well-pleaded complaint" rule and rules applicable strictly to actions under the Declaratory Judgment Act, including *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950); *Public Ser. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237 (1952); and *Franchise Tax Bd. of Calif. v. Const. Laborers Vac. Trust*, 463 U.S. 1 (1983). (App. 12, 16-17.)

The United States Court of Appeals for the Eighth Circuit affirmed, except that the Court of Appeals held that Petitioners' action should be stayed, rather than dismissed, pending the outcome of the state court proceedings commenced by the Director.

ARGUMENT

THE DECISION OF THE COURT OF APPEALS IN THIS CASE, AND DECISIONS BY CERTAIN OTHER FEDERAL COURTS, ARE IN CONFLICT WITH SUPREME COURT PRECEDENT AND CONGRESSIONAL MANDATES REQUIRING ERISA CASES OF THIS TYPE TO BE RESOLVED EXCLUSIVELY BY FEDERAL COURTS.

A. Claims by ERISA Plan Fiduciaries Are Within the Exclusive Subject Matter Jurisdiction of the United States District Courts.

Since its adoption in 1974, ERISA has regulated employee benefit plans and has protected them broadly against inconsistent state law claims and regulation. 29 U.S.C. § 1001, *et seq.* § 1144(a). To further its broad regulatory scheme, ERISA provides civil remedies to plan fiduciaries, participants and beneficiaries. In § 502(a)(3), 29 U.S.C. § 1132(a)(3), Congress has granted a plan fiduciary the right to bring a federal action "to enjoin any act or practice which violates any provisions of [ERISA] or the term of the plan" or "to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of [ERISA] or the terms of the plan." Congress not only intended to give an ERISA plan fiduciary a federal claim for injunctive and declaratory relief under § 502(e)(3), but mandated that such a claim could be heard only by a United States District Court:

> The district courts of the United States shall have exclusive jurisdiction of civil actions under [ERISA] brought by the Secretary [of Labor] or by a participant, beneficiary, or fiduciary.

ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1). Unlike other statutes which create concurrent jurisdiction, in § 502(e)(1) "Congress *unequivocally* stated that the jurisdiction of the federal courts is exclusive." *Yellow Freight Systems, Inc. v. Donnelly*, 494 U.S. 820, 823 (1990) (emphasis added). *See also, Ingersoll-Rand v. McClendon*, 498 U.S. 133, 143-44 (1990). In *Franchise Tax Bd. of Calif. v. Const. Laborers Vac. Trust*, 463 U.S. 1, (1983), this Court made clear that "federal jurisdiction over suits under § 502(a)(3) is exclusive and they are governed entirely by federal common law." *Id.* at 20, n. 20.

B. The Decision of the Court of Appeals Improperly Permits District Courts To Abstain From Exercising Their Exclusive Jurisdiction Over § 502(a)(3) Claims.

Despite the clear mandate of Congress that the federal courts are the exclusive forum for hearing a fiduciary's claim for equitable relief, the Court of Appeals in this case held that Petitioners could not seek redress from the federal court, but instead, had to raise their ERISA claims merely as defenses in the state court proceedings. The analysis of the Court of Appeals is wrong, and threatens to undermine completely the mandate that ERISA fiduciaries are entitled to prosecute their claims in a federal forum.

In interpreting § 502(a)(3) of ERISA, the Court of Appeals drew an artificial distinction that was never intended by Congress. It held that the availability of the exclusive federal remedies prescribed in § 502(a)(3) of ERISA really involves a two-step determination: (1) a

determination of whether a plan or a fiduciary falls within the ambit of ERISA; and (2) a determination of whether the plan or fiduciary is entitled to the remedy it seeks under § 502(a)(3). According to the Court of Appeals, Congress committed only the second of these two determinations to the federal courts for determination, and left the determination of the ERISA status of a plan or fiduciary to the concurrent jurisdiction of the state and federal courts. That holding is unprecedented and is flatly wrong. Nothing in ERISA suggests that Congress intended to make such a distinction. Indeed, by enacting §§ 502(a)(3) and (e)(1), Congress intended ERISA plans and fiduciaries to be protected from having to resort to state forums to vindicate their federal rights. Yet, under the interpretation given by the Court of Appeals, state regulators or any other adversary of an ERISA plan or fiduciary, could easily negate a plan fiduciary's § 502(a)(3) remedies, and effectively keep the ERISA plan or fiduciary out of federal court, by commencing some state court or state administrative proceeding against the plan or fiduciary and then arguing that the plan or fiduciary can raise its ERISA claims as a defense to the action pending in the state forum. Indeed, litigation between ERISA fiduciaries and state regulators does not arise in a vacuum, but occurs only after the state regulator has threatened to take some form of adverse action against the ERISA fiduciary or ERISA entity. Under such circumstances, state regulators easily can commence administrative or state court enforcement proceedings, and thereby place the ERISA issues before state adjudicators. This clearly is not the result Congress intended

when it made federal courts the exclusive forum for § 502(a)(3) remedies.

The Court of Appeals' determination is furthermore illogical to the extent that it permits a state court to determine whether a federal court has exclusive subject matter jurisdiction. If the state court determines that the plan or the fiduciary does have ERISA status, then the federal court's jurisdiction over the fiduciary's § 502(a)(3) claim is exclusive. But, if such is the case, what jurisdiction did the state court have to decide the question of ERISA status in the first instance? Only by exercising its jurisdiction to decide its own jurisdiction can a federal court prevent this anomaly.

The Court of Appeals also erroneously relied on a number of state court decisions to "buttress" its conclusion that concurrent state court jurisdiction exists to determine ERISA status. According to the Court of Appeals, those state court decisions "have in the past decided questions of ERISA status without correction by the United States Supreme Court or Congress." 58 F.3d at 1269. However, what the decision of the Court of Appeals fails to recognize is that the state court cases upon which it relied were all cases which were properly within the *concurrent* jurisdiction of the federal and state courts, *e.g.*, claims by an ERISA participant or beneficiary or benefits under § 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B). The fact that Congress has provided for concurrent jurisdiction over claims by ERISA participants or beneficiaries for benefits under § 502(a)(1)(B), and that state courts therefore can determine ERISA status in such cases, provides no authority whatever for the notion that concurrent jurisdiction exists under the federal exclusive

remedy and jurisdiction provisions of §§ 502(a)(3) and (e)(1).

C. Other Federal Courts Have Improperly Abdicated Their Exclusive Jurisdiction over ERISA § 502(a)(3) Claims.

The decision of the Eighth Circuit Court of Appeals is part of a trend by certain federal courts to avoid resolving ERISA claims which fall within their exclusive jurisdiction, and instead, to send such claims to state forums for resolution. *See, Fresh Int'l Corp. v. Agricultural Labor Relations Bd.*, 805 F.2d 1353 (9th Cir. 1986); *Fuller v. Ulland*, 858 F. Supp. 931 (D. Minn. 1994).[2] In *Fresh Int'l*, the Ninth Circuit, in a footnote, stated that a claim for equitable relief by an ERISA fiduciary under § 502(a)(3) could be recharacterized as merely a preemption "defense" to a state court action. 805 F.2d at 1362 n. 13. Because state courts have concurrent jurisdiction in certain types of ERISA disputes to resolve a *defense* based upon a claim of ERISA preemption, the Ninth Circuit reasoned that the fiduciary's § 502(a)(3) remedy for injunctive relief, once recharacterized as merely a defense, could be resolved by the state court proceedings, and therefore, the court could abstain on the basis of *Younger v. Harris* from hearing the § 502(a)(3) claim.

The court in *Fuller* relied upon similar reasoning to dismiss the Benefit Trust's action for injunctive and

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[2] The *Fuller* case involves some of the same parties as the present case, and is currently on appeal in the Eighth Circuit Court of Appeals.

declaratory relief against the Minnesota Commissioner of Commerce. In that case, the Commissioner issued an administrative cease and desist order against the Benefit Trust, the Association, and certain other parties ordering them to cease and desist from conducting their activities without first complying with Minnesota state insurance licensing requirements. The Benefit Trust sued in federal court under § 502(a)(3) to enjoin the Commissioner. The district court dismissed the action on grounds of *Younger* abstention, holding that the Benefit Trust's claims for injunctive relief could be sufficiently addressed in a Minnesota Department of Commerce administrative contested case proceeding in which ERISA preemption could purportedly be raised as a defense by the Benefit Trust.

The attempt by federal courts to avoid resolving ERISA cases, and to instead send them back to state forums, effectively stripping ERISA plans and fiduciaries of the equitable remedies under § 502(a)(3), must be stopped. Many ERISA plans, such as the Benefit Trust, operate in different states and will be vulnerable to a patchwork of differing and conflicting state regulations if federal courts continue to refuse to hear ERISA cases and instead send them back to the state courts or regulatory agency administrative hearings for resolution, such as in the *Fuller v. Ulland* case. ERISA plans are creatures of federal law, and Congress intended that they be governed by federal law, as construed by the federal courts, not by state courts or state regulators. As noted below, several other Courts of Appeal have recognized the exclusivity of federal jurisdiction over § 502(a)(3) claims, acknowledged their obligation to exercise that jurisdiction, and have flatly rejected abstention.

THIS COURT SHOULD RESOLVE THE CONFLICT THAT EXISTS IN THE FEDERAL COURTS OVER APPLICATION OF ABSTENTION PRINCIPLES TO ERISA CASES INVOKING EXCLUSIVE FEDERAL JURISDICTION.

A conflict exists in the Courts of Appeal on the issue of whether the federal district courts can abstain, on *Younger* grounds or other grounds, from hearing claims by ERISA plans and fiduciaries under ERISA § 502(a)(3). For example, in *General Motors Corp. v. Buha*, 623 F.2d 455 (6th Cir. 1980), a pension plan trustee commenced a federal court action seeking to enjoin a judgment creditor and a state court judge from issuing a writ of garnishment which would have been served on the trustee. The defendant asserted, *inter alia*, that the federal district court should have abstained and required the plan's trustee to litigate in the state court garnishment proceedings. The Sixth Circuit rejected the defendant's abstention argument, observing:

> Further, GM was not a party to the state court proceedings *and could not have initiated an action in state court in its fiduciary capacity because of the preemption provision of 29 U.S.C. § 1132 (e), supra.* Thus, abstention would not have been required on the ground that GM could have tendered its federal claim in a single state court proceeding.

623 F.2d at 459 (emphasis added). Likewise, in *General Motors v. California State Bd. of Equalization*, 815 F.2d 1305 (9th Cir. 1987), *cert. denied*, 485 U.S. 941 (1988), plan fiduciaries commenced an action in federal court for equitable relief against a state tax collection agency and others to enjoin collection of a tax. In summarily rejecting *Younger* abstention, the Ninth Circuit held that the suit

was one over which the federal courts exercise exclusive jurisdiction pursuant to ERISA § 502(e)(1) and that abstention would therefore be inappropriate. 815 F.2d at 1308-09. Other federal courts have similarly rejected abstention with respect to claims which arise under § 502(a)(3) and which are within the exclusive subject jurisdiction of the federal courts. *Livolsi v. Ram Const. Co., Inc.*, 728 F.2d 600, 601-02 (3rd Cir. 1984); *Levy v. Lewis*, 635 F.2d 960, 967 (2d Cir. 1980); *Gilbert v. Burlington Indus., Inc.*, 765 F.2d 320, 329 (2d Cir. 1985), *aff'd*, 477 U.S. 901 (1986).

The decision of the Eighth Circuit in this case, and the decision in *Fresh Int'l* permitting *Younger* abstention with respect to claims within the federal courts' exclusive jurisdiction under § 502(e)(3), are squarely at odds with the cited decisions from the other circuits. This Court should resolve the conflict among the circuits on this important issue.

THE DECISION OF THE COURT OF APPEALS IMPERMISSIBLY DELEGATES TO A STATE COURT THE DETERMINATION OF A FEDERAL COURT'S SUBJECT MATTER JURISDICTION.

Because federal courts are limited to the subject matter jurisdiction conferred by Congress, a party invoking the jurisdiction of the federal courts bears the burden of establishing that subject matter jurisdiction exists. *Kokkonen v. Guardian Life Ins. Co. of America*, 114 S.Ct. 1673, 1675 (1994). When jurisdictional averments in the complaint are challenged, the federal district court is charged with the obligation of determining whether subject matter jurisdiction exists. *McNutt v. General Motors Acceptance*

Corp. of Indiana, Inc., 298 U.S. 178, 189 (1936). Thus, federal courts have the jurisdiction, and the duty, to adjudicate those issues which are determinative of their own jurisdiction. *United States v. United Mine Workers of America*, 330 U.S. 258, 292 n. 57 (1947) (federal courts have the jurisdiction to resolve disputes about whether jurisdiction exists). Under Rule 12(b) of the Federal Rules of Civil Procedure, a federal district court must decide all issues relating to the existence of its own subject matter jurisdiction.

The jurisdiction of federal courts cannot be prescribed by actions of states. *First Nat'l Bank of Chicago v. United Air Lines*, 342 U.S. 396, 339-400 (1952). Nor can federal courts delegate to an administrative agency the adjudication of federal court jurisdictional disputes. *See Ramey v. Bowsher*, 9 F.3d 133, 136 n. 7 (D.C. Cir. 1993).

The Eighth Circuit's decision to delegate the Benefit Trust's status as an ERISA plan to a state court constitutes an unprecedented effort to permit a state court to decide whether exclusive federal jurisdiction exists. Where ERISA plan status is pleaded on the face of the complaint, the federal district court must determine whether such status has been correctly alleged, and cannot delegate that issue for resolution in a state court or administrative proceeding.

CONCLUSION

For the foregoing reasons, the Court should grant the Writ of Certiorari.

Respectfully submitted,

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APPENDIX

International Association of Entrepreneurs of America; International Association of Entrepreneurs of America Benefit Trust; International Association of Entrepreneurs of America, Inc., Appellants, v. Jay Angoff, Director, Missouri Department of Insurance, Appellee.

International Assn. of Entrepreneurs of America v. Angoff

No. 94-3810

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

April 12, 1995, Submitted

June 30, 1995, Filed

JUDGES: Before WOLLMAN and MURPHY, Circuit Judges, and DAVIS,* District Judge.

OPINION BY: WOLLMAN

OPINION:

WOLLMAN, Circuit Judge.

International Association of Entrepreneurs of America and associated entities (collectively "IAEA") appeals from the order dismissing its petition filed under the Declaratory Judgment Act, *28 U.S.C. § 2201.* IAEA asserted exclusive federal jurisdiction to decide the

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* The HONORABLE MICHAEL J. DAVIS, United States District Judge for the District of Minnesota, sitting by designation.

merits of its ERISA claim. The district court[1] held that the matter could be resolved in a parallel state proceeding and dismissed the petition. Although we essentially agree with the district court's treatment of the case, we conclude that the case should not have been dismissed, and we therefore vacate the dismissal and remand for entry of a stay.

I

IAEA provides various insurance and benefits services to Missouri employers who are association members. Defendant, Jay Angoff, Director of the Missouri Department of Insurance ("Angoff"), sought an injunction in Missouri state court to stop IAEA from selling insurance without a state license. IAEA sought to remove the Missouri action to federal court, but the petition was denied as untimely.

IAEA then filed this declaratory action in federal court, alleging that IAEA's insurance activities were covered by the Employee Retirement Income Security Act of 1974 (ERISA), codified as amended at *29 U.S.C. §§ 1001*-1461, and seeking a declaration that IAEA was exempt from state insurance regulation under ERISA provisions preempting such state rules.

The district court granted Angoff's motion to dismiss on the basis that IAEA's federal preemption claim was in substance nothing more than an affirmative defense to

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[1] The Honorable Scott O. Wright, Senior United States District Judge for the Western District of Missouri.

Angoff's state law claim and that the Declaratory Judgment Act was not intended to be a vehicle for such affirmative defenses. Having dismissed on this ground, the district court declined to address Angoff's argument that IAEA does not operate an employee welfare benefit plan of the type covered by ERISA. Likewise, the district court purported not to address Angoff's third ground for dismissal, that being Younger abstention. See *Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423, 73 L. Ed. 2d 116, 102 S. Ct. 2515 (1982); Younger v. Harris, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971).*

II

A

The keystone argument upon which IAEA's appeal depends is that ERISA contemplates that only federal courts decide matters of ERISA status. Under IAEA's exclusive federal jurisdiction theory, since ERISA guarantees IAEA a right to petition only federal courts for injunctive relief against state attempts to regulate ERISA plans, this declaratory action must be allowed to proceed, as the issues it raises cannot be addressed in any other forum.

ERISA § 502(a)(3), (*29 U.S.C. § 1132*(a)(3)), establishes the right of an ERISA fiduciary to an injunction against practices violative of ERISA. ERISA § 502(e)(1), (*29 U.S.C. § 1132*(c)(1)), provides that only a federal court can issue such an injunction. For purposes of discussion we presume that under these provisions an ERISA fiduciary can indeed seek an injunction based on assertions of improper state regulation like those IAEA makes here.

E.g., *Md Physicians & Assoc. v. State Bd. of Ins., 957 F.2d 178* (5th Cir.) (rejecting declaratory action on merits ground), cert. denied, *121 L. Ed. 2d 125, 113 S. Ct. 179 (1992); Atlantic Health Care Benefits Trust v. Foster, 809 F. Supp. 365, 368 (M.D. Pa. 1992)*, aff'd mem., *6 F.3d 778 (3rd Cir. 1993)*, cert. denied, *114 S. Ct. 689 (1994)*. But IAEA's appeal fails because no court has yet decided whether IAEA is an ERISA plan as it alleges.

ERISA nowhere makes federal courts the exclusive forum for deciding the ERISA status vel non of a plan or fiduciary. Unless instructed otherwise by Congress, state and federal courts have equal power to decide federal questions. *Federal Express Corp. v. Tenn. Pub. Serv. Comm'n, 925 F.2d 962, 968* (6th Cir.), cert. denied, *502 U.S. 812, 112 S. Ct. 59, 116 L. Ed. 2d 35 (1991); CSXT, Inc. v. Pitz, 883 F.2d 468, 472 (6th Cir. 1989)*, cert. denied, *494 U.S. 1030, 108 L. Ed. 2d 616, 110 S. Ct. 1480 (1990)*. Because ERISA is silent on the matter of the power to declare ERISA status, we conclude that the question of IAEA's ERISA status falls under the usual concurrent state and federal jurisdiction.

Until IAEA has proven its allegation that ERISA applies, questions of preemption and exclusive federal jurisdiction do not enter this case. Until the preliminary issue of ERISA status is decided, IAEA may not seek the exclusive federal protections available to an ERISA plan. See JAMES F. JORDEN, ET AL., HANDBOOK ON ERISA LITIGATION, ch. 1, § 1.01, at 4 (1992) (hereafter ERISA LITIGATION) ("if no [ERISA] plan is involved, then ERISA's broad preemption of state law claims is not triggered."); see also *MD Physicians, 957 F.2d at 182* (preemption issues need not be considered until ERISA status

established). (While we presume for discussion purposes that IAEA, if held to be covered by ERISA, could seek to enjoin the state court proceeding, this proposition is at least arguable. See 1975 *Salaried Retirement Plan, etc. v. Nobers, 968 F.2d 401, 408 (3rd Cir. 1992)* (refusing to enjoin state action deciding matters within exclusive federal jurisdiction), cert. denied, *122 L. Ed. 2d 370, 113 S. Ct. 1066 (1993); Total Plan Servs. v. Texas Retailers Ass'n, 925 F.2d 142, 144-46 (5th Cir. 1991)* (same); ERISA LITIGATION ch. 1, § 1.04[A], at 29 ("Despite this grant of exclusive jurisdiction, a federal court ordinarily may not enjoin a state court action seeking to adjudicate claims exclusively within federal court jurisdiction.").)

Our conclusion that concurrent jurisdiction exists at this preliminary stage of the litigation is buttressed by the fact that the courts of Missouri and other states have in the past decided questions of ERISA status without correction by the United States Supreme Court or Congress. *Marshall, et al. v. Bankers Life and Cas. Co., 2 Cal. 4th 1045, 832 P.2d 573, 575* (Cal.) (plan covered by ERISA), cert. denied, *121 L. Ed. 2d 537, 113 S. Ct. 601 (1992); Rizzi v. Blue Cross of S. Calif., 206 Cal. App. 3d 380, 253 Cal. Rptr. 541, 542 (Cal.Ct.App. 1988)* (covered), cert. denied, *493 U.S. 821, 107 L. Ed. 2d 44, 110 S. Ct. 78 (1989); Cramer v. Ass'n Life Ins. Co., 569 So. 2d 533, 534 (La. 1990)* (covered; ERISA status litigated in lower courts but not appealed to state Supreme Court); cert. denied, *499 U.S. 938, 113 L. Ed. 2d 447, 111 S. Ct. 1391 (1991); Blue Cross Hosp. Servs., Inc. of Missouri, et al. v. Frappier, 681 S.W.2d 925, 931 (Mo. 1984)* (not covered), vacated, *472 U.S. 1014*, and readopted on remand, *693 S.W.2d 326 (Mo. 1985); Angoff v.*

Kenemore, et al., 887 S.W.2d 782, 786 (Mo.Ct.App. 1994) (not covered).

Thus, what IAEA asserts to be an exclusive federal jurisdiction to decide ERISA status by declaration is actually an exclusive federal jurisdiction to grant certain types of declaratory and injunctive relief once ERISA status has been established by either a state or federal court. Accordingly, the district court was correct in holding that IAEA's allegation that it is an ERISA fiduciary can be asserted as an affirmative defense in the ongoing state court action.

B

The question remains whether the district court had the discretion to defer consideration of this declaratory action. While as a general proposition an alleged ERISA fiduciary can move for a federal declaration of its ERISA status, see *MD Physicians, 957 F.2d at 180; Atlantic Health Care, 809 F. Supp. at 368,* the usual discretionary limitations on declaratory actions apply unless Congress instructs differently. See *Franchise Tax Bd. of Calif. v. Constr. Laborers Vacation Trust for S. Calif. et al., 463 U.S. 1, 18-19, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (1983); BASF Corp. v. Symington, 50 F.3d 555, 557 (8th Cir. 1995); Omaha Property and Cas. Ins. Co. v Johnson, 923 F.2d 446, 447-48 (6th Cir. 1991); Continental Airlines v. Goodyear Tire & Rubber Co., 819 F.2d 1519, 1524 (9th Cir. 1987); Transamerica Occidental Life Ins. Co. v. DiGregorio, 811 F.2d 1249, 1253 (9th Cir. 1987)* A review of the procedural facts of this case together with precedent in analogous situations convinces us such limitations may properly be applied here.

It was only after it had been sued in state court and its removal petition had been denied as untimely that IAEA filed this declaratory action. This sequence of events alerts us to be on guard for ties between the state and federal actions, because the Declaratory Judgment Act is not to be used either for tactical advantage by litigants or to open a new portal of entry to federal court for suits that are essentially defensive or reactive to state actions. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 18 n.20, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983); BASF, 50 F.3d at 558* (citing cases); *Continental Cas. Co. v. Robsac Indus., 947 F.2d 1367, 1372-73 (9th Cir. 1991); Omaha Property, 923 F.2d at 448; Continental Airlines, 819 F.2d at 1524; Transamerica, 811 F.2d at 1253; Home Fed. Sav. and Loan Ass'n v. Ins. Dept. of Iowa, 571 F.2d 423, 427 (8th Cir. 1978).*

More specifically, the Declaratory Judgment Act is not to be used to bring to the federal courts an affirmative defense which can be asserted in a pending state action. *Franchise Tax Bd., 463 U.S. at 16* (discussing *Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 94 L. Ed. 1194, 70 S. Ct. 876 (1950)); BASF, 50 F.3d at 558.* In addition, the Declaratory Judgment Act is not meant to expand federal jurisdiction. *Franchise Tax Bd., 463 U.S. at 15-16; Home Federal, 571 F.2d at 427 n.17.* Here, IAEA passed up its chance to remove to federal court. Limitations on removal may or may not be jurisdictional; but either way, the limits must be strictly construed and enforced. 14A CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE, § 3732 at 527 & n.41 (1985 & Supp. 1995) (hereafter WRIGHT & MILLER). There is no need to allow state court defendants like IAEA to circumvent the

removal statute's deadline by using the Declaratory Judgment Act as a convenient and temporally unlimited back door into federal court. See *Continental Airlines, 819 F.2d at 1524* (referring to special federal court discretion to prevent circumvention of removal statute).

A district court's decision on whether or not to proceed with a declaratory judgment action is reviewed under the abuse of discretion standard. *Wilton v. Seven Falls Co., 115 S. Ct. 2137, 132 L. Ed. 2d 214,* (U.S. June 12, 1995). There was no abuse of discretion here.

C

Both parties appear to assume that the district court implicitly engaged in a Younger abstention analysis. It is clear that the district court to some extent relied on the principles of comity and federalism in coming to its decision; also, the district court indicated that its dismissal may have hinged on the existence of a parallel state proceeding. Order at 8-9.

Although we need not address the abstention issue, our discussion above may have effectively resolved it. The doctrine of abstention is premised on the idea that a federal court may defer to a state court confronted with a similar controversy: there is no need for abstention unless the state and federal courts have concurrent jurisdiction of an issue or case. See *Dailey v. National Hockey League, 987 F.2d 172, 178* (3d Cir.), cert. denied, *126 L. Ed. 2d 36, 114 S. Ct. 67 (1993); Levy v. Lewis, 635 F.2d 960, 967 (2d Cir. 1980).* For this reason, IAEA's argument against abstention presumes that the federal and state suits here are

based on two separate causes of action, a presumption that we reject.

We note in closing that because concurrent jurisdiction exists in state and federal court to decide the question of IAEA's ERISA status, the district court should not have dismissed for lack of jurisdiction under FED. R. CIV. P. 12(b)(1). While pre-answer motions are ostensibly enumerated in FED. R. CIV. P. 12(b), district courts have the discretion to recognize additional pre-answer motions, including motions to stay cases within federal jurisdiction when a parallel state action is pending. *Brillhart v. Excess Ins. Co. of America, 316 U.S. 491, 494-96, 36 L. Ed. 1620, 62 S. Ct. 1173 (1942);* see generally 5A WRIGHT & MILLER, § 1360 at 432, 438-41 (1990 & Supp. 1995). Here, while the state court action may finally resolve the case, it is also possible that further federal proceedings may prove necessary. So long as a possibility of return to federal court remains, a stay rather than a dismissal is the preferred mode of abstention. See *Wilton, 1995 U.S. LEXIS 3908,* at *22 1995 WL 347333, at *7 n.2; *Bob's Home Service, Inc. v. Warren County, 755 F.2d 625, 628 (8th Cir. 1985);* 17A WRIGHT & MILLER, § 4247 at 136-38 (1988). Properly understood, Angoff's motion was for such a stay, not dismissal based on lack of jurisdiction. Accordingly, we vacate the dismissal and remand for entry of a stay.

International Association of Entrepreneurs of America, et al., Appellants, vs. Jay Angoff, etc., Appellee.

International Assn. of Entrepreneurs of America v. Angoff

No. 94-3810WMJC

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

August 4, 1995, Decided

Appeal from the United States District Court for the Western District of Missouri.

Appellants' petition for rehearing has been considered by the court and is denied.

August 4, 1995

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

INTERNATIONAL ASSOCIATION OF ENTREPRENEURS OF AMERICA, et. al.,	)	No. 94-4052-CV-C-5
Plaintiffs,	)	
vs.	)	
JAY ANGOFF, Director, Missouri Department of Insurance,	)	
Defendant.	)	

ORDER

Before this Court are plaintiff's motion for reconsideration and defendant's opposition. For the reasons set forth below, plaintiff's motion will be denied.

Background

Defendant, Director of the Missouri Division of Insurance, brought an action in state court seeking an injunction against plaintiff, the International Association of Entrepreneurs of American [sic], and affiliated Benefit Trust and an affiliated corporation (IAEA). In the state action, the Director seeks to enjoin plaintiff from operating in Missouri because they are an "insurance company" and have not obtained a certificate of authority as required by state law. IAEA argues that they are not subject to the state regulations because they are an

Employee Welfare Benefit Plan and pursuant to ERISA, they are exempt from state regulation. IAEA filed an action in this Court invoking the federal jurisdiction of ERISA and the Federal Declaratory Judgment Act and asked this Court to declare they are an ERISA Employee Welfare Benefit Plan. Defendant filed a motion to dismiss based on lack of federal jurisdiction and the motion was granted. Plaintiff now argues that this Court's decision should be reconsidered because federal jurisdiction was proper.

Analysis

In summary, plaintiff claims that jurisdiction is proper because the "well-pleaded complaint" doctrine is only appropriately applied in removal causes, and because ERISA provides for federal jurisdiction. Defendant correctly argues that this Court's decision to dismiss was based on the dictum of the United States Supreme Court in *Public Serv. Comm'n of Utah v. Wycoff*, 344 U.S. 237, 248 (1952) that stated, "where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court." *See also, Home Fed. Sav. and Loan Assoc. of Algona v. Ins. Dept. of Iowa*, 571 F.2d 423, 426-27 (8th Cir. 1978).

In this case, the impending state action is based on state claims and thus, federal jurisdiction is improper. No new issues have been presented and because this Court is

still not persuaded by plaintiff's arguments, there is no need to rearticulate the prior ruling.

Both parties argue the applicability of the *Younger* abstention doctrine. Because this Court ruled to dismiss this case, there is no need to address the abstention issue.

Accordingly it is hereby

ORDERED that plaintiff's motion to reconsider (doc. #18) is denied.

/s/ Scott O. Wright
SCOTT O. WRIGHT
Senior United States District Judge

November 2, 1994.

UNITED STATES DISTRICT COURT

Western District of Missouri

JUDGMENT IN A CIVIL CASE

International Association of Entrepreneurs of America,

v.

Jay Angoff

Case Number: 94-4052-CV-C-5

_ ***Jury Verdict.*** *This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.*

X ***Decision by Court.*** *This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.*

IT IS ORDERED AND ADJUDGED

_ *that the Clerk dismiss plaintiffs' lawsuit in accordance with this Court's April 13, 1994 order*

_ *that defendants' motion to dismiss is granted [April 13, 1994].*

ENTERED ON: November 21, 1994

November 21, 1994
Date

R. F. CONNOR
Clerk

/s/ Joe Russel
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

INTERNATIONAL ASSOCIATION OF ENTREPRENEURS OF AMERICA, et. al.,	)	No. 94-4052-CV-C-5
Plaintiffs,	)	
vs.	)	
JAY ANGOFF, Director, Missouri Department of Insurance,	)	
Defendant.	)	

ORDER

Before this Court are defendant's motion to dismiss with suggestions and plaintiff's suggestions in opposition to the motion. For the reasons set forth below, defendant's motion will be granted.

BACKGROUND

Defendant, Director of the Missouri Division of Insurance, brought an action in state court seeking an injunction against these plaintiffs, the International Association of Entrepreneurs of America, an affiliated Benefit Trust and an affiliated corporation (hereinafter referred to collectively as "IAEA"). In the state court action, the Director seeks to enjoin IAEA from operating in Missouri because he claims they are an "insurance company" and have not obtained a certificate of authority as required by

state law. IAEA has claimed, as an affirmative defense, that they are an Employee Welfare Benefit Plan and that pursuant to ERISA they are not subject to the state regulations. IAEA attempted to remove that case to this Court, but because they failed to do so within the 30-day time limit provided for in 28 U.S.C. § 1446(b), this Court found the removal improper and remanded the case back to the state court. Now, IAEA has filed a new action in this Court, invoking the federal jurisdiction of ERISA and the Federal Declaratory Judgment Act and asking this Court to declare that they are an Employee Welfare Benefit Plan under ERISA and thus are not subject to licensing requirements imposed upon insurance companies in Missouri. The Director has filed a motion to dismiss, alleging that this Court does not have jurisdiction over this matter because: (1) IAEA's federal claim is, in reality, only an attempt to establish a defense to a state law cause of action; and (2) the plan in question is not an Employee Welfare Benefit Plan, or if it is, its a MEWA, and thus ERISA does not prohibit the State's regulation of the plan. This Court finds the Director's first argument persuasive and thus will not address the second one.

ANALYSIS

The Director claims that under the law as set out in *Skelly Oil Co. v. Phillips Petroleum Co.*, 70 S.Ct. 876 (1950), and developed in *Public Service Commission of Utah v. Wycoff Co.*, 73 S.Ct. 236 (1952), and *Franchise Tax Board v. Construction Laborers Vacation Trust*, 103 S.Ct. 2840 (1983), this Court does not have jurisdiction to decide this case.

In *Skelly Oil*, the Supreme Court considered whether a party could bring a contract dispute to federal court, based solely on the jurisdiction of the Federal Declaratory Judgment Act. The case involved several contracts between sellers of natural gas and Phillips. Phillips was buying the gas to sell to the Michigan-Wisconsin Pipeline Company. The contracts between Phillips and the sellers each provided that the seller could terminate the contracts at any time after December 1, 1946 and before Michigan-Wisconsin obtained a certificate of public convenience and necessity. The certificate was issued on November 30, 1946, but was not made public until December 2, 1946. On December 2, 1946, the sellers gave notice of termination of the contracts to Phillips, based on their contention that Michigan-Wisconsin had not received the required certificate. Phillips and Michigan-Wisconsin filed a lawsuit in federal court, claiming federal jurisdiction based upon their invocation of the Federal Declaratory Judgment Act, and asking the federal court to declare that a certificate of public convenience and necessity "within the meaning of [the] Natural Gas Act and [the] contracts" had been issued prior to the sellers' purported termination of the contracts. The Supreme Court, in analyzing the case, framed the issue as "whether a suit like this 'arises under the Constitution, laws or treaties of the United States' . . . so as to enable District Courts to give declaratory relief under the Declaratory Judgment Act." The court answered that question in the negative, noting that, "not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit." (citations omitted).

IAEA contends that *Skelly Oil* is distinguishable from this case, because the federal issue here is apparent from review of IAEA's federal Complaint and there is no need to look to anticipated defenses to discover the federal issue. However, in *Public Service Commission of Utah v. Wycoff Co.*, 73 S.Ct. 236 (1952), the Supreme Court held that in some cases a district court is not required to confine its review to the bare pleadings of the Complaint, but rather must determine whether the Complaint actually seeks establishment of a defense to a state law cause of action and, if so, must determine whether that state law cause of action is a federal claim.

In *Wycoff*, which was decided not long after *Skelly Oil*, the Supreme Court had before it a case wherein the plaintiff, a company involved in transporting products, sought a declaration that their transporting the products between points in Utah constituted "interstate commerce." They apparently sought such declaration because of their fear that the Utah Public Service Commission would attempt to regulate such transportation and their belief that obtaining such a declaration would invoke the authority of the interstate Commerce Commission which would preempt state regulations. The Supreme Court found that the matter was not ripe because there was no actual controversy and the Declaratory Judgment Act was not meant to provide a means for obtaining anticipatory rulings. The Supreme Court also discussed the importance of maintaining the "proper federal-state relationship." *Wycoff*, 73 S.Ct. at 242. In describing that relationship, the Court made the following statements:

> Declaratory proceedings in the federal courts against state officials must be decided with

regard for the implications of our federal system. State administrative bodies have the initial right to reduce the general policies of state regulatory statutes into concrete orders and the primary right to take evidence and make findings of fact. It is the state courts which have the first and last word as to whether a particular order is within the legislative terms of reference so as to make it the action of the State. . . . Anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism. Is the declaration contemplated here to be *res judicata*, so that the Commission cannot hear evidence and decide any matter for itself? If so the federal court has virtually lifted the case out of the State Commission before it could be heard. . . . The procedures of review usually afford ample protection to a carrier whose federal rights are actually invaded, and there are remedies for threatened irreparable injuries. State courts are bound equally with the federal courts by the Federal Constitution and laws. Ultimate recourse may be had to this Court by certiorari if a state court has allegedly denied a federal right. In this case, as in many actions for declaratory judgment, the realistic position of the parties is reversed. The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant may assert in the Utah courts. . . . *Where the complaint in action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert does not itself involve a*

> *claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action.* Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law.

Id at 242-43 (emphasis added).

Here, clearly IAEA is attempting to circumvent the state court proceedings by having their defense to the action established by declaration in federal court. Despite their urging, the Court cannot merely ignore the fact that there is currently a state court action pending, and that by deciding the question posed, this Court would be lifting the question out of state court.

This Court finds that although IAEA's defense to the state action clearly involves a question of federal law, the action filed in state court does not arise under federal law. It is an action to enjoin the IAEA from operating in Missouri because of their failure to comply with state laws. The action could not have been brought in federal court, as there is no federal question raised on the face of the state court complaint. Furthermore, a case like the one currently pending in state court does not necessarily involve a federal law issue, nor does the state action, by its nature raise the "select group of claims (which are) necessarily federal in character." *Metropolitan Life Insurance Co. v. Taylor,* 107 S.Ct. 1542, 1546 (1987). On the contrary, the state action is an attempt to enforce a law

regulating insurance, which is specifically *not* preempted by ERISA. 29 U.S.C. § 1144(b)(2)(A). This Court will not find that every state law action to enforce insurance regulations is completely preempted by ERISA merely because of the possibility that the state defendant will raise ERISA preemption as a defense.

In *Franchise Tax Board v. Construction Laborers Vacation Trust*, 103 S.Ct. 2840 (1983), a state agency brought an action in state court alleging that the Construction Laborers Vacation Trust (CLVT) had not paid money allegedly owed pursuant to state law. The agency sought, "a declaration . . . of the parties' respective rights." CLVT claimed that ERISA preempted the state law in question, and removed the case to federal court. The case eventually came before the Supreme Court, which held that the case was not properly removed as the cause of action originally filed in state court was not within the original jurisdiction of the federal courts. The Court noted that, "federal courts have regularly taken original jurisdiction over declaratory judgment suits in which, if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question." *Franchise Tax Board*, 103 S.Ct. at 2851. The court pointed as an example to a suit by an alleged patent infringer to declare a patent invalid. "An infringement suit by the declaratory judgment defendant would raise a federal question over which the courts have exclusive jurisdiction." *Id.* at 2851, n.19. The court then explained that, "taking jurisdiction over this type of suit is consistent with the dictum in (*Wycoff*), in which we stated only that a declaratory judgment plaintiff could not get original federal jurisdiction if the anticipated

lawsuit by the declaratory judgment defendant would not 'arise under' federal law." *Id.*

Of course, the case before this Court is not the first kind of case discussed above, in which the suit brought by the state agency necessarily involves an issue of federal law. It is only when the state court defendant raises ERISA preemption as a defense that federal law is injected, and of course that does not happen every time the state tries to enforce its insurance regulations. Thus, it appears to this Court that this is the other kind of suit discussed in footnote 19 of *Franchise Tax Board* – one where the declaratory judgment plaintiff cannot get original federal jurisdiction because the pending lawsuit by the declaratory judgment defendant does not arise under federal law.

This Court finds instructive yet another footnote in *Franchise Tax Board,* in which the court found it "appropriate to note that considerations of comity make us reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it." 103 S.Ct. at 2852, n.22.

For their argument, IAEA points to § 1132 of ERISA, which expressly provides that "a civil action may be brought . . . by a participant, beneficiary, or fiduciary to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or to obtain other appropriate equitable relief to redress such violations or to enforce any provisions of this subchapter. . . ." 29 U.S.C. § 1132(a)(3). Section 1132(e)(1) provides that federal courts have exclusive jurisdiction of actions brought under the relevant section of ERISA. Thus, the

group argues, they have the express right to file an action in federal court pursuant to the terms of ERISA.

However, this federal action does not exist in a vacuum. This Court cannot simply ignore the fact that at the time this suit was filed, and presently, there is an action pending in state court which involves the very issue raised here. Despite IAEA's urging otherwise, this Court believes that fact alters the analysis. The Supreme Court has not decided this exact issue, but touched upon a very similar question in yet another footnote in *Franchise Tax Board*. CLVT was the state court defendant who removed the case to federal court and then filed a motion to dismiss. The Supreme Court noted that:

> CLVT suggests that we treat the motion to dismiss . . . filed in the District Court as a counterclaim for a declaratory judgment under § 602 [sic] of ERISA, which *might* then provide an independent jurisdictional *basis* for reaching the merits of the pre-emption issue in this case. . . .

Franchise Tax Board, 103 S.Ct. at 2853, n.24 (emphasis added).

The court decided not to treat the motion to dismiss as a counterclaim for a declaratory judgment, and so did not decide the question. However, the use of the word "might" suggests to this Court that the Supreme Court did not intend that the jurisdictional authority of ERISA would automatically outweigh all other considerations in a case such as this.

Although the law is less than crystal clear, it appears to this Court that a declaratory action which might properly be in federal court otherwise, is *not* properly here if it

is, in reality, an attempt to establish a defense to a pending state action. Thus, the Court finds it lacks jurisdiction to hear this matter, because the Complaint seeks only to establish a defense to an action pending in state court, and the pending state court action does not, inevitably, involve a question of federal law.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss is granted.

/s/ Scott O. Wright
SCOTT O. WRIGHT
Senior United States
District Judge

April 13th, 1994.

UNITED STATES DISTRICT COURT

Western District of Missouri

JUDGMENT IN A CIVIL CASE

International Association of
Entrepreneurs of America, et al.

v.

Jay Angoff

Case Number: 94-4052-CV-C-5

_ ***Jury Verdict.*** *This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.*

X ***Decision by Court.*** *This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.*

IT IS ORDERED AND ADJUDGED

that defendant's motion to dismiss is granted.

ENTERED ON: April 13, 1994

April 13, 1994
Date

R. F. CONNOR
Clerk

/s/ J. Russel
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI,
CENTRAL DIVISION

INTERNATIONAL ASSOCIATION OF ENTREPRENEURS OF AMERICA,	Case NO. C4 4052-CV-C-5
INTERNATIONAL ASSOCIATION OF ENTREPENEURS OF AMERICA BENEFIT TRUST, and	(Filed Feb. 17, 1994)
INTERNATIONAL ASSOCIATION OF ENTREPRENEURS OF AMERICA, INC.	
Plaintiffs,	
vs.	
JAY ANGOFF, Director, Missouri Department of Insurance,	
Defendant.	

PETITION FOR DECLARATORY JUDGMENT

I. THE PARTIES

1. International Association of Entrepreneurs of America ("IAEA") is a nonprofit corporation incorporated under the laws of the State of Texas and "organized exclusively for fraternal, educational, and social purposes as a professional, commercial, and trade association." A

copy of the Certificate of Incorporation and Articles of Incorporation for IAEA are attached hereto as Exhibit A.

2. Plaintiff IAEA is trustor, by amendment dated December 11, 1992, on a certain trust document entitled "Restatement of Agreement and Declaration of Trust International Association of Entrepreneurs of America Benefit Trust," which document is attached hereto as Exhibit B. This document establishes the Plaintiff International Association of Entrepreneurs of America Benefit Trust ("IAEA/BT") as a trust formed pursuant to ERISA for the purpose of providing health care services and benefits, death benefits, disability benefits and/or other benefits for the exclusive benefit of participating employers, their employees, and the dependants and beneficiaries of such employers.

3. Plaintiff International Association of Entrepreneurs of America, Inc. ("INC") is a for profit Texas corporation retained by IAEA to recruit members for its association.

4. Defendant Jay Angoff is the duly appointed Director of the Missouri Department of Insurance and a citizen of the United States and the State of Missouri. The Missouri Department of Insurance is a state agency created and existing pursuant to Article IV, Section 36(b), of the Missouri Constitution, and is "charged with the execution of all laws now in force, or which may be hereafter enacted, in relation to insurance and insurance companies doing business in" Missouri, pursuant to Section 374.010, RSMo.

II. JURISDICTION AND VENUE

5. This action arises under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. Section 1001 et seq. ("ERISA"), and constitutes a Federal question so as to confer jurisdiction on this Court pursuant to 28 U.S.C. Section 1331, 28 U.S.C. Section 2201 and Rule 57 of the Federal Rules of Civil Procedure.

6. Defendant Angoff is a resident of the Western District of Missouri. Therefore, venue in the Western District of Missouri is proper under 28 U.S.C. Section 1391.

III. FACTS

7. Section 1002(1) of ERISA defines the terms "employee welfare benefit plan" and "welfare plan" to mean:

> "[A]ny plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an an [sic] employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in Section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions)."

8. Section 1002(3) defines "employee benefit plan" or "plan" to mean:

> [A]n employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan."

9. Section 1002(5) defines the term "employer" to mean:

> "[A]ny person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; *and includes a group or association of employers acting for an employer in such capacity.*" (emphasis added)

10. In accordance with the IAEA/BT Trust Agreement, the International Association of Entrepreneurs of America Employee Welfare Benefit Plan (the "Plan") was established and is maintained by IAEA/BT for the benefit of the employees and dependants of the members of IAEA. A copy of the "Plan Document and Summary Plan Description Plan No.501" is attached hereto as Exhibit C.

11. Pursuant to the terms of the IAEA/BT Trust Agreement, responsibility for the administration and maintenance of IAEA/BT and the Plan is vested in the Benefit Review Committee ("BRC"), which is defined at pages 6 to 7 of the Trust Agreement.

12. As defined, the BRC is a group of participating employers and their representatives that have extensive administrative powers over the maintenance of the trust. Under the terms of the Trust Agreement, the BRC constitutes a group of employers acting on behalf of all employers relative to an employee benefit plan so as to

meet the definition of "employer" contained in Section 1002(5). The significant administrative duties of the BRC and its status of "employer" within the meaning of Section 1002 fulfills the requirement of Section 1002(1) that the "plan, fund, or program" that provides employee benefits be "maintained" by an employer. Consequently, IAEA/BT and the Plan can be seen to meet the definition of an "employee welfare benefit plan" and an "employee benefit plan" within the meaning of Section 1002 and to come within the regulatory authority of ERISA pursuant to 29 U.S.C. Section 1003.

13. Section 1144 sets forth the general scope of ERISA preemption of state law. Subsection (a) of this section provides that ERISA generally preempts any and all state laws which "relate to" any employee benefit plan subject to ERISA. Section 1144(b)(2) goes on to say that:

> "(B) Neither an employee benefit plan . . . , nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer . . . for purposes of any law of any state purporting to regulate insurance companies, insurance contracts, ... "

14. Defendant has taken the position that IAEA/BT is acting as an unauthorized insurance company within the meaning of Section 375.786, RSMo, and has sought to enjoin its operations in Missouri based upon this position.

15. Subparagraph (B) of Section 1144(b)(2) clearly indicates that Missouri State insurance law cannot be used to characterize such ERISA organizations as insurance companies. Consequently, defendant's actions are

contrary to the clear preemption expressed by the United States Congress in enacting ERISA.

16. Said action has caused and will continue to cause irreparable harm to Plaintiffs.

WHEREFORE, Plaintiffs pray for an order of the Court declaring IAEA/BT and the Plan to be an Employee Welfare Benefit Plan operating under ERISA and exempt from any licensing requirements for insurance companies in Missouri, for their costs expended herein, and for such further relief as the Court may deem just and proper.

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In The

Supreme Court of the United States

October Term, 1995

INTERNATIONAL ASSOCIATION OF ENTREPRENEURS OF AMERICA BENEFIT TRUST,

Petitioner,

v.

JAY ANGOFF, DIRECTOR, MISSOURI DEPARTMENT OF INSURANCE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

1. Did the District Court abuse its discretion by requiring IAEA to establish its status as an ERISA plan as a predicate to maintaining an action for declaratory judgment under 28 U.S.C. § 2201?

2. Do state and federal courts have concurrent jurisdiction to decide ERISA preemption issues raised as an affirmative defense in state court?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Jay Angoff, Director of the Department of Insurance of the State of Missouri, respectfully requests that this Court deny the petition for writ of certiorari which seeks review of the Eighth Circuit's opinion. That opinion is reported at 58 F.3d 1266 (8th Cir. 1995) and is reprinted in the Petition for Writ of Certiorari at Appendix A.

RESTATEMENT OF THE CASE

Petitioner's statement of the case posits as fact a proposition for which there is no factual basis in the record below and omits a key procedural fact from the record below.

There is no basis in the record below for Petitioner's statement that "[t]he founding employer members of the Association established an ERISA-regulated" employee welfare plan. There is no basis in the record because Petitioner did not include this allegation in the Petition for Declaratory Judgment. Further, because it granted the Director's motion to dismiss on procedural grounds, the district court did not address the substantive issue of whether IAEA operates an employee welfare benefit plan within the meaning of ERISA.

Petitioner has omitted a fact relied upon by the Eighth Circuit, namely that Petitioner filed its declaratory judgment action only after it had attempted to remove the Director's state court action and the removal petition

had been denied as untimely. This fact supports the District Court's exercise of its discretion to prevent IAEA from circumventing the state court proceeding and the removal statutes, 28 U.S.C. §§ 1441, et seq.

REASONS TO DENY THE WRIT

I. THE DECISION OF THE EIGHTH CIRCUIT DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR CONGRESSIONAL INTENT THAT FEDERAL COURTS HAVE EXCLUSIVE JURISDICTION OVER ERISA FIDUCIARIES' CLAIMS UNDER § 502 BECAUSE THIS ACTION WAS NOT BROUGHT UNDER § 502 OF ERISA.

In its attempt to obtain review by this Court, Petitioner mischaracterizes the issue presented by the Eighth Circuit's decision that state and federal courts have concurrent jurisdiction over the type of claim brought by Petitioner. Petitioner would have this Court believe that this case was brought under § 502 of ERISA, 29 U.S.C. § 1132, when in fact the case was brought only under 28 U.S.C. § 2201, the Declaratory Judgment Act. This is not a § 502 case because Petitioner did not invoke § 502 in its Petition for Declaratory Judgment. Petitioner did not plead § 502 in its petition, nor did the petition seek injunctive relief available under § 502. Under the heading, "Jurisdiction and Venue," the petition stated, "This action arises under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. Section 1001 et seq. ("ERISA"), and constitutes a Federal question so as to confer jurisdiction on this Court pursuant to 28 U.S.C. Section 1331, 28 U.S.C. Section 2201 and Rule 57 of

the Federal Rules of Civil Procedure." (Petition for Declaratory Judgment ¶ 5, at App. 28.) In the prayer for relief, Petitioner sought an order "declaring IAEA/BT and the Plan to be an Employee Welfare Benefit Plan operating under ERISA and exempt from any licensing requirements for insurance companies in Missouri, for their costs expended herein, and for such further relief as the Court may deem just and proper." (Petition for Declaratory Judgment, at App. 31.) Thus the petition invoked the provisions of ERISA in order to establish federal question jurisdiction and not in order to obtain an injunction or other equitable relief under the civil enforcement provisions of § 502.

The Eighth Circuit treated the case as one brought under the Declaratory Judgment Act rather than under § 502 of ERISA, see App. 1-App. 2, because the Petition for Declaratory Judgment did not invoke § 502. This is why the court did not directly address the issue of abstention under *Younger v. Harris*, 401 U.S. 36, 91 S.Ct. 746 (1971) that Petitioner attempts to place before this Court.

The Court should deny the Petition for Writ of Certiorari because there is no conflict with this Court's decisions or Congressional intent with regard to the civil enforcement provisions of § 502 because this case was brought under the Declaratory Judgment Act, 28 U.S.C. § 2201 and not under § 502 of ERISA.

II. THERE IS NO CONFLICT IN THE COURTS OF APPEAL OR OTHER FEDERAL COURTS OVER APPLICATION OF *YOUNGER* ABSTENTION TO ERISA CASES INVOKING EXCLUSIVE FEDERAL JURISDICTION TO PRESENT A CLAIM THAT ERISA PREEMPTS A PENDING STATE ACTION.

Even if Petitioner had pleaded § 502 in the Petition for Declaratory Judgment, *Younger v. Harris*, 401 U.S. 36, 91 S.Ct. 746 (1971) would have required dismissal. Every court that has examined the issue of *Younger* abstention in depth in cases where the federal plaintiff seeks to circumvent a pending state court action by asserting what is essentially a defense of ERISA preemption has determined that *Younger* abstention is appropriate. *Fresh International Corp. v. Agricultural Labor Relations Board*, 805 F.2d 1353 (9th Cir. 1986) and *Fuller v. Ulland*, 858 F. Supp. 931 (D. Minn. 1994) (*appeal pending*) are firmly grounded in the *Younger* abstention doctrine and may not be characterized merely as attempts by the federal courts to avoid resolving ERISA claims brought under § 502. The recent decision by the United States Court of Appeals for the Fourth Circuit, *Employers Resource Management Co., Inc. v. Shannon*, 65 F.3d 1126 (4th Cir. 1995), underscores the appropriateness of *Younger* abstention in such cases. There the federal court thoroughly analyzed the grounds for *Younger* abstention in an ERISA context and determined that *Younger* abstention applies where the claim can be raised as an affirmative defense in the pending state action. *Fuller v. Bartlett*, 894 F. Supp. 874 (D.Md. 1995) (*appeal pending*) is another case where a federal court applied *Younger* abstention to an ERISA fiduciary's claims after an in-depth examination of the issues.

In *Employers Resource Management*, supra, Employers Resource Management, Inc. (ERM), a staff leasing company which maintained employee benefit plans, filed suit in federal court seeking injunctive and declaratory relief under ERISA's civil enforcement provisions from an administrative proceeding instituted by the Virginia Insurance Commissioner to prevent the company from operating a multiple employer welfare arrangement (MEWA) without a state insurance license. 65 F.3d at 1129. The United States Court of Appeals for the Fourth Circuit upheld the District Court's dismissal under *Younger* and under the Anti-Injunction Act, 28 U.S.C. § 2283. 65 F.3d at 1134, 1136. Crucial to the Court's determination that *Younger* abstention required dismissal was its finding that the company could raise its ERISA preemption defense in the state administrative proceeding. 65 F.3d at 1136. The Court held, "ERM has not provided us with any reason to believe that the Commission is either incapable of reviewing ERM's claim of preemption under ERISA or that the Commission is somehow less trustworthy than its federal counterpart. We refuse to create an exception to *Younger* abstention based on ERM's mere assertion of an ERISA preemption challenge." *Id.*

Petitioner erroneously asserts that the state court cases on which the Eighth Circuit relied concerned only claims by ERISA participants or beneficiaries under § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (Petition for Writ of Certiorari at 8). Neither *Angoff v. Kenemore, et al.*, 887 S.W. 2d 782 (Mo. App. 1994) nor *Blue Cross Hosp. Serv., Inc. of Missouri, et al. v. Frappier*, 681 S.W. 2d 925 (Mo. 1984), vacated, 472 U.S. 1014, and readopted on remand, 698 S.W. 2d 326 (Mo. 1985) involved claims by ERISA

participants or beneficiaries. In *Angoff v. Kenemore*, supra, the Missouri Director of Insurance brought an action under Mo. Rev. Stat. § 375.786, the same state statute involved in the underlying state court proceeding herein, to enjoin operation of a MEWA. 887 S.W. 2d at 783-84, 788. The MEWA operators raised a defense of ERISA preemption, and the Missouri Court of Appeals held that because the MEWA's benefit plan was not an employee welfare benefit plan within the meaning of ERISA, ERISA did not preempt the Director from regulating the plan. 887 S.W. 2d at 787-88. In *Blue Cross Hosp. Serv., Inc.*, supra, health services corporations sought a declaration that certain Missouri "mandated provider" statutes were preempted by ERISA. 698 S.W. 2d at 326-27. The Missouri Supreme Court held that the challenged statutes were laws regulating insurance and were therefore not preempted. 698 S.W. 2d at 327. Both *Angoff v. Kenemore* and *Blue Cross Hosp. Serv.* demonstrate the ability of state courts to decide ERISA preemption issues.

The cases finding *Younger* abstention appropriate do not conflict with the decisions cited by Petitioner because those decisions do not support the proposition that state courts lack jurisdiction to decide an affirmative defense of ERISA preemption. *General Motors Corporation v. Buha*, 623 F.2d 455 (6th Cir. 1980) is not on point because the federal plaintiff, General Motors, was not a party to the state court proceedings brought by Buha and could not have instituted its action in state court. See 622 F.2d at 459.

General Motors v. California Board of Equalization, 815 F.2d 1305 (9th Cir. 1987), *cert. denied*, 485 U.S. 941 (1988), is likewise not on point because General Motors, the

federal plaintiff, was not a party to the state proceeding, and filed its federal action only after it learned of the state court decision. 815 F.2d at 1307. As in *Buha*, the federal plaintiff had no opportunity to have its federal claims considered by the state court.

Livolsi v. Ram Const. Co., 728 F.2d 600 (3rd Cir. 1984) is not on point because it did not involve *Younger* abstention and there was no parallel state court proceeding. *See* 728 F.2d at 601.

Gilbert v. Burlington Indus., Inc., 765 F.2d 320 (2d Cir. 1985), *aff'd*, 477 U.S. 901 (1986), involved abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098 (1943) rather than *Younger* abstention, and is therefore not on point. *See* 765 F.2d at 329.

Levy v. Lewis, 635 F.2d 960 (2d Cir. 1980), is also distinguishable from the instant case. There, the federal plaintiff, a plan beneficiary, alleged that the actions of New York's Superintendent of Insurance, as statutory liquidator of an insurance company, violated the terms of an employee welfare benefit plan and amounted to breach of fiduciary duty under ERISA. 635 F.2d at 962. The United States Court of Appeals for the Second Circuit held that the district court should have abstained from deciding Levy's "breach of plan" claim because the state court had concurrent jurisdiction, but that abstention was not warranted on the "breach of fiduciary duty" claim because it could be heard only in federal court under 29 U.S.C. § 1132(e)(1). 635 F.2d at 967. *Levy* is distinguishable from the line of cases supporting application of *Younger* abstention to cases involving claims of ERISA preemption because plaintiff Levy's breach of fiduciary duty claim

was in the nature of a purely offensive cause of action under ERISA. Such a claim clearly could not be raised in state court due to the grant of exclusive federal jurisdiction in § 502(e). In contrast, federal plaintiffs whose ERISA claims are in the nature of an affirmative defense of preemption have full opportunity to raise those claims in a pending state court action.

III. THE EIGHTH CIRCUIT'S HOLDING THAT STATE COURTS HAVE CONCURRENT JURISDICTION TO DETERMINE ERISA STATUS WHERE THE ISSUE MAY BE RAISED AS PART OF AN AFFIRMATIVE DEFENSE DID NOT DELEGATE DETERMINATION OF FEDERAL SUBJECT MATTER JURISDICTION TO THE STATE COURT AND DOES NOT CONFLICT WITH DECISIONS OF THIS COURT.

Petitioner's final point again confuses the issue of jurisdiction to declare whether its plan is an ERISA plan, which is not reserved exclusively to the federal courts, with exclusive federal jurisdiction to grant certain types of relief to ERISA plan fiduciaries. The Eighth Circuit did not delegate determination of federal subject matter jurisdiction as Petitioner alleges. Rather, it applied the accepted legal principle that state courts have the power to decide federal questions unless prohibited by Congress. See Decision of the Eighth Circuit at App. 4, citing *Federal Express Corp. v. Tenn. Pub. Serv. Comm'n*, 925 F.2d 962, 968 (6th Cir. 1991), *cert. denied*, 502 U.S. 812, 112 S.Ct. 59 (1991) and *CSXT, Inc. v. Pitz*, 883 F.2d 468, 472 (6th Cir. 1989), *cert. denied*, 494 U.S. 1030, 110 S.Ct. 1480 (1990). The holding in *CSXT*, supra, was based on the rule as

declared by this Court that " 'State courts normally have concurrent jurisdiction of federal issues unless such jurisdiction is withdrawn by federal statute.' " 883 F.2d at 472, citing *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478-79, 101 S.Ct. 2870, 2875-76 (1981). Petitioner's citation of decisions of this Court concerning the power and obligation of the federal courts to decide questions of subject matter jurisdiction (Petition for Writ of Certiorari, pp. 12-13) does not demonstrate that the Eighth Circuit's holding regarding concurrent jurisdiction of federal questions conflicts with the general principle that federal courts have jurisdiction to determine their own jurisdiction. None of the cases Petitioner cites even remotely address the issue of concurrent federal and state jurisdiction.

CONCLUSION

For the foregoing reasons, the Court should deny the Writ of Certiorari.

Respectfully submitted,

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